06-3745-cv (L)

06-3785-cv (CON); 06-3789-cv (CON); 06-3800-cv (CON); 06-4187 (CON)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, SYED AMJAD ALI JAFFRI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM,

Plaintiffs-Appellees,

IBRAHIM TURKMEN, ASIF-UR-REHMAN SAFFI, YASSER EBRAHIM, HANY IBRAHIM, SHAKIR BALOCH, AKHIL SACHDEVA AND ASHRAF IBRAHIM,

*Cross-Appellant*s,

v.

JOHN ASHCROFT, ROBERT MUELLER, JAMES ZIGLAR, DENNIS HASTY, AND JAMES SHERMAN,

*Defendants-Appellant*s-*Cross-Appellees*,

MICHAEL ZENK, SALVATORE LOPRESTI, STEVEN BARRERE, WILLIAM BECK, LINDSEY BLEDSOE, JOSEPH CUCITI, HOWARD GUSSAK, MARCIAL MUNDO, DANIEL ORTIZ, ELIZABETH TORRES, PHILLIP BARNES, SYDNEY CHASE, MICHAEL DEFRANCISCO, RICHARD DIAZ, KEVIN LOPEZ, MARIO MACHADO, MICHAEL MCCABE, RAYMOND MICKENS, JOHN OSTEEN, BRIAN RODRIGUEZ, SCOTT ROSEBERY, CHRISTOPHER WITSCHEL, RAYMOND COTTON, JAMES CUFFEE, CLEMMET SHACKS, JOHN DOES 1-20,

Defendants,

STUART PRAY

Defendant-Cross Claimant,

UNITED STATES OF AMERICA

Defendant-Cross Defendant-Cross Appellee.

On Appeal from the United States District Court

for the Eastern District of New York

BRIEF OF APPELLANTS DENNIS HASTY AND JAMES SHERMAN

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JURISDICTIONAL STATEMENT

The district court had jurisdiction over this action pursuant to 28 U.S.C. § 1331 and 1346(b) (2006). It denied Appellants Dennis Hasty's ("Hasty") and James Sherman's ("Sherman") (collectively "Wardens")[1] Motions to Dismiss on June 14, 2006, and the Wardens timely noticed their appeals on August 10 and 11, 2006, respectively. This is an interlocutory appeal concerning the denial of qualified immunity, turning on issues of law. As such, this Court has jurisdiction under 28 U.S.C. § 1291 (2006), pursuant to the collateral order doctrine. *Behrens v. Pelletier,* 516 U.S. 299, 306 (1996); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Salim v. Proulx,* 93 F.3d 86, 89-91 (2d Cir. 1996).

STATEMENT OF ISSUE

Whether the District Court erred in denying the Wardens' Motions to Dismiss, finding that they were not entitled to qualified immunity, notwithstanding the absence of either: (1) factual allegations that they were personally involved in the actions at issue; or (2) a demonstration that the actions at issue involved

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[1] Although Hasty was the Warden at the Metropolitan Detention Center ("MDC") until April 2002, and Sherman was an Associate Warden during that time, Hasty and Sherman are the only warden-level defendants involved in this Appeal and will be referred to collectively as the "Wardens" for the sake of convenience.

violations of clearly established law and that the Wardens did not act in an objectively reasonable manner under the particular circumstances at issue.

STATEMENT OF THE CASE

This is an interlocutory appeal of the denial of qualified immunity in a *Bivens*[2] action. The Plaintiffs,[3] eight male, non-U.S. citizens, assert that they were arrested on immigration violations following the September 11, 2001 terrorist attacks. Six of the Plaintiffs were held at the Metropolitan Detention Center ("MDC") in Brooklyn; the other two were held at the Passaic County Jail in New Jersey.

Plaintiffs were held in custody for periods ranging from three months to more than six months after receiving final orders of removal or grants of voluntary departure. *Turkmen v. Ashcroft,* No. 02-CV-2307, 2006 WL 1662663, at *1

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[2] *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics,* 403 U.S. 388 (1971).

[3] The Plaintiffs are Asif-Ur-Rehman Saffi ("Saffi"), Syed Amjad Ali Jaffri ("Jaffri"), Yasser Ebrahim ("Ebrahim"), Hany Ibrahim ("H. Ibrahim"), Shakir Baloch ("Baloch"), Ashraf Ibrahim ("A. Ibrahim"), Ibrahim Turkmen ("Turkmen"), and Akhil Sachdeva ("Sachdeva"). Compl. at 2; Joint Appendix ("JA") at 91. Since the Third Amended Complaint was filed, Plaintiff Jaffri has voluntarily dismissed his claims against the Wardens. The remaining five Plaintiffs who were detained at the Metropolitan Detention Center in New York will be referred to as "MDC Plaintiffs": Saffi, Ebrahim, H. Ibrahim, Baloch, and A. Ibrahim. *Id.* ¶¶ 16-20; JA at 98-99. The other two Plaintiffs, Turkmen and Sachdeva, were detained at a state-run detention facility in Passaic, New Jersey and therefore have no basis for bringing claims against Hasty and Sherman, as wardens of the MDC. *Id.* ¶¶ 21-22; JA at 99-100.

(E.D.N.Y. June 14, 2006) ("Opinion"); Special Appendix ("SPA") at 1. Plaintiffs do not deny that they were in the United States illegally.

Plaintiffs filed their original Complaint on April 17, 2002, in the United States District Court for the Eastern District of New York. Initially, the United States moved to dismiss on behalf of all defendants on August 26, 2002, and oral argument on the motion was held on December 19, 2002. On June 18, 2003, however, Plaintiffs filed their Second Amended Complaint after the Office of Inspector General ("OIG") released its April 2003 report entitled "The September 11 Detainees: A Review of the Treatment of Aliens Held on Immigration Charges in Connection with the Investigation of the September 11 Attacks" ("OIG Report"), which Plaintiffs filed with the district court as an exhibit to the Second Amended Complaint. *See* JA at 260-477. Thereafter, the parties filed supplemental briefs in support of and opposing the motions to dismiss.

On September 30, 2004, before any ruling on the pending motions, Plaintiffs filed their Third Amended Complaint ("Complaint" or "Compl.") and attached as an exhibit the December 2003 OIG Report entitled "Supplemental Report on September 11 Detainees' Allegations of Abuse at the Metropolitan Detention Center in Brooklyn, New York" ("Supplemental OIG Report"). *See* JA at 211-259. This iteration of Plaintiffs' Complaint alleged that while held at the MDC, their rights were violated in various ways. Plaintiffs have sued 32 named

defendants and 20 "John Doe MDC Correctional Officers," including the United States and numerous federal officials in their individual capacities. These officials range from former Attorney General John Ashcroft to MDC correctional officers. Among those named was Dennis Hasty, the Warden of the MDC during the relevant period until April 2002, and James Sherman, the Associate Warden for Custody during the relevant period. Compl. ¶¶ 26, 28; JA at 101-02. Several of the Defendants, including Hasty and Sherman, moved to dismiss Plaintiffs' Complaint asserting, *inter alia*, their entitlement to qualified immunity.[4]

On December 3, 2004, Judge Gleeson denied Hasty's motion to dismiss (along with Hasty's successor as Warden of the MDC, Michael Zenk) only as to Plaintiffs' conditions of confinement (Claim 3) and excessive force (Claims 12-16 and 31) claims and ordered discovery as to these claims, despite the fact that the Defendants' omnibus motion to dismiss was pending as to all claims. *See* JA at 486-89. Hasty and Zenk timely moved for reconsideration, but the district court denied that motion on January 14, 2005. Neither defendant appealed that ruling.

Then on June 14, 2006, the district court granted in part and denied in part the remaining claims in the omnibus motion to dismiss. *See* Opinion; SPA 1-64.

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[4] An omnibus motion to dismiss based on defendants' entitlement to qualified immunity was filed on November 30, 2004 by John Ashcroft, Robert Mueller, James Ziglar, Dennis Hasty and Michael Zenk. On May 25, 2005, James Sherman filed a motion to dismiss in which he effectively joined the November 30th motion.

Several of the individual defendants noticed interlocutory appeals, which this Court subsequently consolidated.[5]

STATEMENT OF FACTS

Background

On September 11, 2001, the al Qaeda terrorist network hijacked four commercial airplanes and crashed two of the planes into the Twin Towers of the World Trade Center and a third plane into the Pentagon. The fourth plane crashed in rural Pennsylvania. Thousands of people were killed and injured. *Hamdi v. Rumsfeld,* 542 U.S. 507, 510 (2004).

These attacks were the most deadly foreign attacks on American soil in our history and gave rise to a variety of urgent responses. Among these was the almost immediate enactment by Congress of complex legislation that addressed liability issues for airlines and insurance companies, as well as federally funded compensation for the victims of the terrorist attacks.[6]

In addition, "Congress passed a resolution authorizing the President to 'use all necessary and appropriate force against those nations, organizations, or persons

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[5] Hasty noticed his appeal on August 10, 2006. JA at 497-502. Sherman and Ziglar noticed their appeals on August 11, 2006. JA at 503-11. Mueller and Ashcroft noticed their appeal on August 14, 2006. JA at 512-18.

[6] *See* Air Transportation Safety and System Stabilization Act, Pub. L. No. 107-42, 115 Stat. 230 (2001).

he determines planned, authorized, committed or aided the terrorist attacks' or 'harbored such organizations or persons, in order to prevent any future acts of international terrorism against the United States by such nations, organizations, or persons.'" *Hamdi*, 542 U.S. at 510 (quoting Authorization for Use of Military Force, Pub. L. 107-40, 115 Stat. 224 (2001)). One extension of the broad authority given the Executive Branch was a directive from the Attorney General for federal law enforcement officials "to use 'every available law enforcement tool' to arrest persons who 'participate in, or lend support to, terrorist activities.'" OIG Report at 1; JA at 267. At the time, the extent of al Qaeda's (or other's) infiltration of America was unknown.

In the course of executing that order, federal officials arrested and detained many people in the New York metropolitan area for violating federal immigration laws. *Id.* According to the OIG Report, 738 aliens were arrested between September 11, 2001, and August 6, 2002, and they, along with 24 aliens in custody prior to the terrorist attacks, were placed on an "INS Custody List" due to the FBI's suspicion that the aliens either might have a connection to the terrorist attacks or "because the FBI was unable, at least initially, to determine whether they were connected to terrorism." *Id.* at 2; JA at 268.

According to the OIG Report, the Federal Bureau of Prisons ("BOP"), the entity responsible for the detainees once they were arrested and processed,

determined early on to impose special conditions on the detainees. *Id.* at 19-20; JA at 285-286. These "included housing the detainees in the administrative maximum ("ADMAX") Special Housing Unit ("SHU"), implementing a communications blackout, and classifying the detainees as Witness Security ("WITSEC") inmates." *Id.* at 19; JA at 285. The articulated rationale for these actions was that BOP was concerned about the potential security risk of the September 11th detainees, coupled with the fact that "the FBI provided so little information about the detainees" that BOP "did not really know whom the detainees were." *Id.* Thus, BOP decided to "err on the side of caution and treat the September 11 detainees as high-security detainees." *Id.*

Those illegal alien detainees who were sent to the MDC were initially "subjected to the most restrictive conditions of confinement authorized by BOP policy, including a 'lockdown' for 23 hours a day, restrictive escort procedures for all movement outside of the ADMAX SHU cells, and tight limits on the frequency and duration of legal telephone calls." OIG Report at 112; JA at 378. According to the Director of BOP, this determination "resulted from the FBI's assessment and was not the BOP's 'call.'" *Id.* As the OIG Report generally explained, detainees stayed in the ADMAX SHU until they were "cleared" by the FBI. *Id.* at 37-38; JA at 303-04.

Plaintiffs' Allegations

In their putative class action Complaint, the five Plaintiffs in this appeal allege that they were arrested following the September 11, 2001 terrorist attacks, treated as "of interest" to the government's terrorism investigation and placed in detention at the MDC where they were housed in the ADMAX SHU. Plaintiffs assert that in the ADMAX SHU, they were subjected to a variety of abuses that amounted to violations of a number of their constitutional and statutory rights. In total, Plaintiffs assert 31 causes of action against some or all of the various defendants. Only seven causes of action, however, remain against Hasty because the other 24 have either been dismissed, withdrawn, or are not at issue in this appeal. For Sherman, 13 of the 31 causes of action remain at issue. The claims against Hasty and Sherman at issue here are as follows:

- Claim 5 is a Fifth Amendment Equal Protection claim based on Plaintiffs' claims of being subjected to "harsher treatment" than similarly-situated non-citizens based on race, religion, and national origin;[7]
- Claim 7 is based on interference with religious practices;
- Claim 8 is based on confiscation of personal property;
- Claim 20 is based on Plaintiffs' assignment to the ADMAX SHU;

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[7] An additional part of claim 5, an equal protection claim based on the Plaintiffs' length of detention, was dismissed by the district court.

- Claims 21 and 22 are based on the denial of right to counsel and access to the courts;
- Claim 23 is a Fourth and Fifth Amendment claim based on unreasonable strip searches.

The additional six that pertain to Sherman are as follows:

- Claim 3 is a Fifth Amendment Due Process claim based on conditions of confinement;
- Claims 12, 13, 14, 15 and 16 are Fourth and Fifth Amendment claims based on the use of excessive force against Plaintiffs.

Importantly, the Complaint lacks any specific factual allegations of the Wardens' "personal involvement" in any of the actions that form the basis of Plaintiffs' claims. As with many of the other supervisory defendants, the allegations asserted against the Wardens consist of nothing more than boilerplate language such as they "knew or should have known," without *any* precise allegations of fact. As a result, while many MDC on-the-scene officer Defendants filed Answers to the Complaint, most of the Wardens and other higher-level Defendants moved to dismiss. The primary basis for each of those motions was the officials' entitlement to qualified immunity.

The District Court's Decision

On June 14, 2006, the district court denied Defendants' omnibus motion to dismiss, except with respect to Plaintiffs' claims concerning: the length of their detention; the purported delay in serving Plaintiffs with charging documents; the failure to allow for bond from detention; and international law.

First, Judge Gleeson addressed Plaintiffs' jurisdictional claims and found that the Illegal Immigration Reform and Immigrant Responsibility Act deprived the court of jurisdiction over Plaintiffs' denial of bond causes of action (Claims 18 and 19). Opinion at *28-29; SPA at 33-35. The court then rejected Defendants' *Bivens* "special factors" argument, finding that although "the INA provides a comprehensive *regulatory* scheme for managing the flow of immigrants in and out of the country, it is by no means a comprehensive *remedial* scheme for constitutional violations that occur incident to the administration of that regulatory scheme." Opinion at *29; SPA at 34. In addition, the court was not "persuaded that the events of September 11, 2001 provide any cause to relax enforcement of the rights guaranteed by our Constitution. Rather, as I explained in *Elmaghraby*, the extraordinary factual context that gave rise to the plaintiffs' detention is best considered in the analysis of whether the defendants are entitled to qualified immunity."[8] Opinion at *30; SPA at 35.

The district court then addressed Plaintiffs' constitutional claims, denying Defendants' motions to dismiss as to Plaintiffs' conditions of confinement and unreasonable strip searches (Opinion at *30-36; SPA at 35-42), interference with religious practices (Opinion at *36; SPA at 41-42); assignment to the ADMAX

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[8] *Elmaghraby v. Ashcroft*, No. 04-1409, 2005 WL 2375202 (E.D.N.Y. Sep. 27, 2005).

SHU (Opinion at *36; SPA at 42); Equal Protection in part (Opinion at *41-43; SPA at 47-49); confiscation of personal property (Opinion at *43-44; SPA at 49-51); and communications blackout claims (Opinion at *46-49; SPA at 53-55). Judge Gleeson dismissed Plaintiffs' remaining constitutional claims.[9]

The district court also addressed Defendants' arguments that Plaintiffs had failed to allege their personal involvement relating to Plaintiffs' claims of unconstitutional conditions of confinement. Here, Judge Gleeson found, for the reasons set forth in *Elmaghraby*, that Plaintiffs had sufficiently alleged personal involvement "principally through incorporation of the OIG Report." (Opinion at *35; SPA at 41). The court, however, glossed over or ignored the Wardens' claims that Plaintiffs did not sufficiently allege their personal involvement with respect to the other causes of action. This appeal ensued.

SUMMARY OF ARGUMENT

The district court erred in denying the Wardens' Motions to Dismiss on qualified immunity grounds. Regardless of whether the Plaintiffs have alleged violations of their clearly established constitutional rights, Plaintiffs' claims

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[9] The court also dismissed three out of Plaintiffs' four Federal Tort Claims Act claims against the United States (false imprisonment, negligent delay in clearing plaintiffs and deprivation of medical treatment). Defendants' motion to dismiss Plaintiffs' conversion of property cause of action was denied. (Opinion at *50-54; SA at 56-61).

against the Wardens are not viable because the Wardens either: (1) acted in an objectively reasonable manner pursuant to the facially valid orders of their superiors; or (2) were simply not personally involved in the violations at issue.

First, many of Plaintiffs' claims are based on conduct driven by policy decisions made by officials at the highest levels of the BOP and other high-ranking government officials, and the findings of the OIG make clear that the Wardens' role in these claims was confined to implementing the orders of their superiors. Even if these policies may have resulted in violations of Plaintiffs' rights, the Wardens – *based on the circumstances known to them* – reasonably believed they were following facially valid orders and would not be violating Plaintiffs' constitutional rights. This Court has determined that a federal official, who acts pursuant to the facially valid orders of his superiors, is acting in an "objectively reasonable" manner as a matter of law and is therefore entitled to qualified immunity.

Second, for claims not involving established BOP post-September 11 policies, such as Plaintiffs' interference with their religious practices claim, the District Court erred in finding that the OIG Report adequately establishes the Wardens' personal involvement. The OIG Report barely makes any mention of the Wardens; at most, it describes certain facially reasonable policies created by BOP that the Wardens were instructed to implement. Further, the OIG Report is silent

as to many of Plaintiffs' claims, and the Complaint does not contain any additional factual allegations to this effect. In fact, notwithstanding its reliance on the OIG Report, the Complaint fails to allege any non-conclusory fact that links the Wardens to the purported violations. As such, the Complaint fails to adequately allege predicate facts for supervisory liability, and therefore, the Wardens are entitled to qualified immunity.

ARGUMENT

STANDARD OF REVIEW

The district court's denial of the Wardens' Motions to Dismiss on qualified immunity grounds concerns purely legal issues, which this Court must review *de novo*. *See Pena v. DePrisco*, 432 F.3d 98, 107 (2d Cir. 2005).

HASTY IS ENTITLED TO QUALIFIED IMMUNITY AS TO ALL OF PLAINTIFFS' REMAINING CLAIMS.

I. The Law of Qualified Immunity.

Qualified immunity reconciles two important but countervailing interests: (1) providing a damages remedy to vindicate constitutional guarantees; and (2) minimizing the heavy social costs imposed by litigation against federal officials in their individual capacities. *Harlow v. Fitzgerald,* 457 U.S. 800, 814 (1982) (citing *Butz v. Economou,* 438 U.S. 478, 506 (1978), and *Bivens,* 403 U.S. at 410). The Supreme Court has repeatedly balanced these concerns by recognizing that

qualified immunity protects officials from suit unless their actions violated "clearly established statutory or constitutional rights of which a reasonable person would have known." *Behrens,* 516 U.S. at 305. Dismissal is *required* unless the *non-conclusory* fact allegations demonstrate a constitutional violation by the Defendant official, and that the particular right in question was clearly established at the time defendant acted. *Saucier v. Katz,* 533 U.S. 194, 199-201 (2001); *Siegert v. Gilley,* 500 U.S. 226, 232 (1991). Where there is a "legitimate question" as to the standards governing conduct in particular circumstances, "it cannot be said" that "clearly established" rights were violated. *Mitchell*, 472 U.S. at 535, n.12.

The Supreme Court has recognized that *Bivens* suits "frequently run against the innocent," and impose a heavy cost "not only to the defendant officials, but to society as a whole," including "the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office." *Harlow,* 457 U.S. at 814. As this Court recognized long ago – in language particularly apt to the facts of this case – there is also the very real danger that the fear of being sued will "dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties." *Gregoire v. Biddle,* 177 F.2d 579, 581 (2d Cir. 1949). Indeed, immunity ensures "the vigorous and fearless performance" of law enforcement duties "essential to the proper functioning of the criminal justice

system." *Imbler v. Pachtman*, 424 U.S. 409, 427-28 (1976).[10] Thus, it is vital to protect officials from such claims with a vigorous application of qualified immunity "at the earliest possible stage in litigation." *Hunter v. Bryant,* 502 U.S. 224, 227 (1991).

The "essence" of qualified immunity is its possessor's "entitlement not to have to stand trial or face the other burdens of litigation," *Mitchell,* 472 U.S. at 526, including the "broad-ranging discovery" that can be "peculiarly disruptive of effective government." *Harlow,* 457 U.S. at 817; *Anderson v. Creighton*, 483 U.S. 635, 646, n.6 (1987). Because qualified immunity is "an *immunity from suit* rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Mitchell,* 472 U.S. at 526; *Siegert,* 500 U.S. at 233.

In examining an official's entitlement to qualified immunity, a court must first consider the threshold question whether "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier,* 533 U.S. at 201; *Siegert*, 500 U.S. at 232. If there is no violation of a constitutional right, "there is no necessity for further inquiries concerning qualified immunity." *Saucier,* 533 U.S. at 201.

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[10] Although *Imbler* is a case involving 42 U.S.C. § 1983 (2006) and not *Bivens*, "the qualified immunity analysis is identical under either cause of action." *Wilson v. Layne*, 526 U.S. 603, 609 (1999).

If, however, a constitutional violation can be demonstrated, "the next sequential step is to ask whether the right was clearly established." *Id*. This inquiry must be made within "*the specific context of the case,* not as a broad general proposition," and the relevant test of "whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 201-02 (emphasis added); *Brosseau v. Haugen,* 543 U.S. 194, 198 (2004). What this means as applied to this case – and as discussed in greater detail below – is that it is not enough to allege broadly, as Plaintiffs do, that their Fifth Amendment or other rights were violated. Rather, the Court must examine the factual context in which the alleged violations occurred to determine whether a clearly established right was violated and the reasonableness of the particular defendants' actions in relation to the alleged violation.

II. Plaintiffs' Claims That Rely On Policies Created by the Wardens' Superiors Should Be Dismissed Because the Wardens' Actions Were Objectively Reasonable.

A. Subordinate Officials Acting Pursuant to the Facially Valid Orders of Their Superiors are Entitled to Qualified Immunity Because Their Conduct is Objectively Reasonable.

This Court has made clear that a subordinate official is not liable for constitutional violations that occur while following his superior's orders, unless the order was "facially invalid." *Varrone v. Bilotti*, 123 F.3d 75, 81-82 (2d Cir. 1997); *see also Anthony v. City of New York*, 339 F.3d 129, 138 (2d Cir. 2003); *Lauro v.*

Charles, 219 F.3d 202, 216 n.10 (2d Cir. 2000); *Washington Square Post #1212 Am. Legion v. Maduro*, 907 F.2d 1288, 1293 (2d Cir. 1990). *Cf. Diamondstone v. Macaluso*, 148 F.3d 113, 126 (2d Cir. 1998) (same). As this Court stated most recently in *Anthony*, "[p]lausible instructions from a superior or fellow officer support qualified immunity where, viewed objectively in light of the surrounding circumstances, they could lead a reasonable officer to conclude that the necessary legal justification for his actions exists . . ." 339 F.3d at 138 (quoting *Bilida v. McCleod*, 211 F.3d 166, 174-75 (1st Cir. 2000)) (other citations omitted).

This is not an "only following orders" defense. Rather, federal officials are entitled only to follow those orders that are plausible, a principle properly grounded in the "objectively reasonable" prong of the qualified immunity test.[11]

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[11] There is no question that a court can decide the objective reasonableness prong of the qualified immunity test on a motion to dismiss. Although "disputes over reasonableness are usually fact questions for juries," in the qualified immunity context, the court is "not concerned with the correctness of the defendants' conduct, but rather the 'objective reasonableness' of their chosen course of action given the circumstances confronting them at the scene." *Lennon v. Miller*, 66 F.3d 416, 421 (2d Cir. 1995). Thus, when the facts are undisputed, as they are here for purposes of the motion to dismiss standard, "the question of whether it was objectively reasonable for the officers to believe that they did not violate the plaintiff's rights is a purely legal determination for the court to make." *Id.* at 422. Indeed, appellate courts – including this one – have reached the "reasonableness" prong of the qualified immunity inquiry on an interlocutory appeal from a motion to dismiss. *See e.g., McEvoy v. Spencer,* 124 F.3d 92, 105 (2d Cir. 1997) (reversing denial of motion to dismiss because "it was objectively reasonable for defendants Spencer and Christopher to believe that McEvoy was

(continued…)

See Anthony, 339 F.3d at 138. An official's entitlement to qualified immunity hinges on whether "it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. Subordinate officials acting pursuant to orders that they reasonably believe in good faith are valid – in the context of the particular circumstances – have no reason to think that their actions are unlawful or could violate another person's legal rights. Thus, such officials' actions are "objectively reasonable," and the doctrine of qualified immunity shields them from claims for damages. *Anthony*, 339 F.3d at 138; *see also Sec. & Law Enforcement Employees v. Carey*, 737 F.2d 187, 211 (2d Cir. 1984) ("prison officials have a 'right to qualified immunity for actions taken in their official capacity if they act in good faith and on the basis of a reasonable belief that their actions were lawful'") (quoting *McCann v. Coughlin*, 698 F.2d 112, 124 (2d Cir. 1983)).

(continued…)
still a policymaker" and, thus, there was no violation of a clearly established right); *Hodorowski v. Ray*, 844 F.2d 1210, 1217 (5th Cir. 1988) (reversing denial of motion to dismiss because "appellants' actions in temporarily removing the children from the home were objectively reasonable, and as a matter of law violated no clearly established right"); *Trulock v. Freeh*, 275 F.3d 391, 403 (4th Cir. 2001) (affirming 12(b)(6) dismissal of Fourth Amendment violation where officers obtained third party consent to look at password-protected computer files because "a reasonable officer in their position would not have known that the search would violate clearly established law").

For example, in *Williams v. Goord*, 142 F. Supp. 2d 416, 421 (S.D.N.Y. 2001), a SHU inmate, after verbally harassing correctional officers, had mechanical restraints placed on his hands and waist for 28 days when he was outside his cell. The inmate sued several prison employees under, *inter alia*, the Eighth Amendment, claiming that the mechanical restraints prohibited him from having "meaningful" opportunities to exercise. *Id.* In ruling on the defendants' entitlement to qualified immunity, the court held that the highest-level officials who constructed the policy were not entitled to qualified immunity, but dismissed the case against the subordinate officers because they "had no input into the development and implementation of the restraint policy and were merely following what they believed to be lawful orders." *Id.* at 430 (citing, *inter alia*, *Varrone,* 123 F.3d at 81).

B. The Wardens' Objectively Reasonable Conduct Requires Dismissal of Plaintiffs' Assignment to the SHU, Equal Protection and Communications Blackout Claims.

Here, many of Plaintiffs' claims consist of challenges to policy decisions made by federal officials superior to the Wardens. Specifically, Plaintiffs' claims based on: (1) the assignment to the SHU in violation of the Due Process clause (Claim 20); (2) being subjected to harsh treatment in violation of the Equal Protection clause (Claim 5); and (3) the "communications blackout" in violation of the First and Fifth Amendments (Claims 21 and 22) all concern the creation and

implementation of specific policies that Plaintiffs claim violated their constitutional rights – policies that were clearly set at levels above the Wardens. These claims must be dismissed against the Wardens because it was objectively reasonable – considering all the circumstances at issue – for them to act pursuant to the BOP's facially valid directives. The OIG Report provides a definitive basis for this conclusion.[12]

But the district erred in holding that the OIG Report provides a basis for *denying* the Wardens' qualified immunity defense because, in fact, the OIG Report undermines the district court's conclusions. The OIG conducted an extensive review of the decision to hold the September 11th detainees (which included Plaintiffs) and unequivocally concluded that the decision to assign them to the

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[12] Although this appeal concerns a motion to dismiss under Rule 12(b)(6), this Court may properly consider the OIG Report. On a motion to dismiss, courts should consider documents outside the pleadings if they are "appended to the complaint or incorporated in the complaint by reference." *See Allen v. WestPoint-Pepperell, Inc.,* 945 F.2d 40, 44 (2d Cir. 1991); *see also Cortec Indus., Inc. v. Sum Holding L.P.,* 949 F.2d 42, 48 (2d Cir. 1991) ("documents plaintiffs had either in its possession or had knowledge of and upon which they relied in bringing suit" were properly considered at motion to dismiss stage). Here, Plaintiffs' Complaint heavily quotes the findings of the OIG, and both the April 2003 and December 2003 OIG Reports were attached to the Second and Third Amended Complaints, respectively. Thus, the district court properly relied on the OIG Report in rendering its decision on Defendants' 12(b)(6) motions, and this Court may similarly do so. *See, e.g.,* Opinion, at *4; SA at 5 ("The Third Amended Complaint, by itself and by incorporating the two OIG reports annexed thereto, alleges the following facts.").

ADMAX SHU was made by high-level BOP and INS officials at the regional or national headquarters, and not by officials at the MDC. That decision originated from the FBI's determinations that these particular individuals were "of high interest" to its investigation of the September 11th terrorist attacks, a classification reserved for those believed to have the greatest likelihood of being connected to terrorism. OIG Report at 17-18; JA at 283-84. After arresting the September 11th detainees for immigration violations, BOP and INS decided to house detainees classified as "of high interest" at the MDC. *Id.* at 19-20; JA at 285-86.

BOP officials – and not the Wardens – then made the decisions about the manner in which to house the detainees at the MDC. *Id.* at 19; JA at 285. Based on the "of high interest" designation, BOP officials had to weigh several potential security risks. *Id.* at 19, 115 n.91; JA at 285, 381. First, BOP believed the September 11th detainees were associated with terrorist activity against the United States and, therefore, considered them a danger to prison employees.[13] *Id.* at 112; JA at 378. Second, BOP considered how the September 11th detainees' detention could affect the FBI's investigation of the September 11th attacks. *Id.* As such,

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[13] This danger was readily apparent at that time because, prior to the September 11th attacks, a convicted terrorist housed at the Metropolitan Correctional Center ("MCC") in Manhattan had seriously injured a correctional officer, which prompted the MCC to establish an ADMAX SHU. *See* OIG Report at 119 n.99; JA at 385.

BOP decided to "err on the side of caution and treat the September 11 detainees as high-security detainees." *Id.* at 19; JA at 285; *see also id.* at 112; JA at 378 (decision to place September 11th detainees in the ADMAX SHU "resulted from the FBI's assessment and was not the BOP's 'call.'"). In addition, BOP officials – and not the Wardens – made the decision to implement a communications blackout based on concerns about the September 11th detainees' ability to communicate both with other inmates and persons outside the MDC. *Id.* at 112-13; JA at 378-79.

Upon receiving the "of high interest" September 11th detainees, MDC officials, including the Wardens, received and complied with BOP orders to place them in the ADMAX SHU and initiate a communications blackout. *Id.* Thereafter, BOP officials repeatedly instructed the MDC, including the Wardens, to keep the September 11th detainees in the ADMAX SHU until they were cleared of any connection with terrorist activities by the FBI. *Id.* at 113, 116; JA at 379, 382. BOP also instructed the MDC, including the Wardens, when the communications blackout could be lifted. *Id.* at 114, 116; JA at 380, 382. As to the Wardens, the OIG Report did not find that they had any involvement in the decision-making process for any of these directives. Instead, it makes clear that the Wardens, as those in charge of operations at the MDC, were to carry out the policies created by high-level BOP officials. *See id.* at 112-14, 116, 126-28; JA at

378-80, 382, 392-94. And, given the circumstances of the time in the immediate aftermath of the unprecedented terrorist attacks, the Wardens reasonably did so. In sum, the Wardens could reasonably rely on the notion that their superiors – or others upon whom they could properly rely, such as the FBI – had properly determined that these individuals were connected in some way with terrorism and thus were deserving of a level of confinement appropriate to that determination.

Plaintiffs' *factual* allegations are consistent with and indeed mirror the OIG's conclusions. *See* Compl. ¶ 80; JA at 115-16. But Plaintiffs nonetheless seek to impute liability against the Wardens based on general and *legal* conclusory allegations that broadly implicate the Wardens as involved in *all* aspects of the *creation and implementation* of these policies. *See id.* at ¶¶ 136, 391; JA at 136, 195.

This Court should not, however, accept as true allegations "that are contradicted either by statements in the complaint itself or by documents upon which its pleadings rely." *See In re Livent, Inc. Noteholders Sec. Litig.*, 151 F. Supp. 2d 371, 405-06 (S.D.N.Y. 2001) (and collecting cases). Thus, this Court must read Plaintiffs' general allegations in light of the specific and contradictory findings of the OIG – findings that are heavily relied upon and incorporated in the Complaint. These findings unequivocally demonstrate that the decisions to assign

Plaintiffs to the ADMAX SHU and to initiate a communications blackout were *not* made by the Wardens.

The OIG Report therefore provides the grounds for dismissal of these claims. Because their superiors' orders – put in proper context – were *not* "facially invalid," the Wardens actions were objectively reasonable when they relied on these orders. In the wake of the September 11th attacks, the Wardens were faced with a unique group of detainees that raised a variety of security risks, and they had no reasonable basis on which to question the legality of the BOP's orders. *See* OIG Report at 19-20, 112-113; JA at 285-86, 378-79. Indeed, as explained above, the BOP had many legitimate reasons for deciding to place the September 11th detainees in the ADMAX SHU. The Wardens had no reason – and, truly, no authority – to dispute the legitimacy of this decision, or the FBI's classification of the September 11th detainees as potentially connected to the terrorist attacks against the United States. In fact, the FBI gave BOP very little information about the September 11th detainees other than the fact that they were considered "of high interest" to the terrorism investigation, *id.* at 19; JA at 285, and, given that the FBI was arguably in a position to know, it was legitimate for BOP – and certainly the Wardens – to rely on that assessment.

In short, the Wardens simply – and reasonably – relied on FBI's determination that these individuals were potentially dangerous, which justified the

strict security measures implemented at the MDC. *See* OIG Report at 126; JA at 392 ("MDC officials relied on the FBI's assessment that the detainees generally were 'of high interest' to its ongoing terrorism investigation . . ."); *see also id.* at 127; JA at 393 ("BOP accepted [the FBI's] assessment, since the BOP normally takes 'at face value' FBI determinations that detainees had a potential nexus to terrorism and therefore were 'high-risk.'"). Given the facts known to the Wardens at the time, it was reasonable to rely on BOP's decision to "err on the side of caution." *Id.* at 19; JA at 285.

Indeed, under a range of factual scenarios – all themselves plausible – these policies were reasonable. Similarly, the applicable law at that time did not provide any reasonable basis to question this policy. BOP procedures permitted administrative detention for inmates that posed security threats similar to those described above during the pendancy of an investigation against them. *See* 28 C.F.R. § 541.22(a). Moreover, the September 11th detainees posed exactly the type of "exceptional circumstances, ordinarily tied to security or complex investigative concerns" that allowed for prolonged custody in administrative detention. 28 C.F.R. § 541.22(c)(1). Therefore, it was reasonable for the Wardens to believe that the order to assign Plaintiffs to the ADMAX SHU was facially valid.

Second, this Court should reach the same conclusion with regard to Plaintiffs' Equal Protection claim that they suffered "harsh treatment" because of their race, religion, and/or national origin.[14] Plaintiffs' general assertion that they suffered "harsh treatment" can be readily divided into two categories: (1) harsh treatment based on the restrictive conditions established in the ADMAX SHU, and (2) alleged "inhumane conditions" resulting from acts of correctional officers and other low-level MDC staff, which included physical and verbal abuse.[15] *See* Compl. ¶ 3; JA at 93-94.

To the extent Plaintiffs' "harsh treatment" claims relate to the conditions they experienced due to the general policies in the ADMAX SHU, the OIG Report demonstrates that the Wardens cannot be responsible for these claims. Again, the Wardens were not involved in the decision to assign Plaintiffs to the ADMAX SHU, and therefore the Wardens could not have known that the decision could have been made for discriminatory reasons. Instead, the Wardens reasonably

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[14] Plaintiffs' Equal Protection claims also involved alleged discrimination based on the length of their detention, but the district court dismissed that claim because Plaintiffs failed to allege clearly established constitutional violations. Opinion at *41-43; SA at 47-49. Even if Plaintiffs did allege clearly established constitutional violations, however, this claim should be dismissed for the same reasons explained above.

[15] The OIG Report does not mention any specific policies created by BOP that resulted in the latter assertions of "harsh treatment." However, dismissal of this portion of their claim is warranted for other reasons, as discussed *infra*, Section III.

believed that the assignment decision was for the security reasons noted *supra*, based on the FBI's determination that the September 11th detainees were potentially connected to terrorist attacks against the United States.[16]

Third, Plaintiffs' claims against the Wardens regarding the "communications blackout" suffer the same fatal defect. As detailed in the OIG Report, the communications blackout was ordered by high-level BOP officials, not the Wardens. OIG Report at 112-13; JA at 378-79. These orders were followed by the MDC staff, including the Wardens. *Id.* The Wardens, however, should not be held liable for any alleged constitutional violations resulting from this policy. Based on the circumstances known to the Wardens at the time, it was objectively reasonable

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[16] In addition, the fact that the Wardens' involvement was limited merely to following their superiors' orders demonstrates that Plaintiffs have failed to state a claim against the Wardens for violation of their Equal Protection rights. An essential element to an Equal Protection claim is that the defendants acted with discriminatory intent. *See Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977). Despite their allegations to the contrary, *see* Compl. ¶¶ 76, 309; JA at 113, 183, the Wardens *could not* have acted with such intent. The decisions regarding their confinement in the ADMAX SHU were made exclusively by BOP in reliance on assessments made the FBI. *See* OIG Report at 19, 112-13; JA at 285, 378-79. The only parties who could have acted with discriminatory animus were the individuals who made the decision to institute this policy; the Wardens could not have acted with discriminatory animus while simply carrying out the orders of their superiors. *See Gomez v. Rivera-Rodriguez*, 344 F.3d 103, 122 (1st Cir. 2003) (granting qualified immunity as to discrimination claim because the subordinate "had no hand in the relevant decisionmaking" and thus, "there is no way that the plaintiffs can carry their burden of showing that she was motivated by a constitutionally impermissible animus"). For this reason alone, the Wardens are entitled to qualified immunity as to Plaintiffs' Equal Protection claim.

for them to accept the validity of this order, particularly given that in the wake of September 11th, the government had strong security concerns that illegal aliens with possible terrorist ties might reveal information vital to national security.[17] Because, under these circumstances, there was no legitimate reason to question their validity, the Wardens' actions in following the orders of their superiors could not have been unreasonable.

Accordingly, this Court should dismiss all of these claims because the Wardens acted pursuant to their superiors' facially valid orders, viewed in the

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[17] Indeed, several courts have held that national security concerns surrounding September 11th justified restrictions on information. *See Ctr. of Nat'l Sec. Studies v. DOJ,* 331 F.3d 918, 926, 932 (D.C. Cir. 2003) (upholding, on national security grounds, government's right to, *inter alia*, withhold names of persons detained for immigration violations in wake of September 11th, and finding that the possibilities that one terrorist might tell another "which of their members were compromised by the investigation, and which were not," or might convey "the substantive and geographic focus of the investigation" were dangers that the government had an obligation to prevent); *N. Jersey Media Group, Inc. v. Ashcroft*, 308 F.3d 198, 217-18 (3d Cir. 2002) (rejecting First Amendment challenge to closure of "special interest" deportation hearings involving INS detainees with alleged connections to terrorism); *ACLU v. DOJ*, 265 F. Supp. 2d 20, 31 (D.D.C. 2003) (upholding government's right to withhold statistics regarding number of times government had utilized information-gathering powers under Patriot Act, including roving surveillance, pen registers, trap devices, demand for tangible things, and sneak-and-peek warrants, on ground that nondisclosure was reasonably connected to protection of national security); *Holy Land Found. for Relief and Dev. v. Ashcroft*, 333 F.3d 156, 164 (D.C. Cir. 2003) (finding that "national security" interests allowed government to designate groups as foreign terrorist organizations based upon classified information and to refuse to divulge that information).

context of the information reasonably known to the Wardens at that time. *See Anthony*, 339 F.3d at 138 (finding that lower-ranking officers were entitled to qualified immunity because they were following the orders of their superiors, and the orders were valid in light of the circumstances reasonably known to the subordinates); *Williams*, 142 F. Supp. 2d at 430 (finding that lower-ranking officers were entitled to qualified immunity because they "had no input into the development and implementation of the restraint policy and were merely following what they believed to be lawful orders"). Indeed, a court may only deny qualified immunity if it determines that "no officer of reasonable competence could have made the same choice in similar circumstances." *Anthony*, 339 F.3d at 138 (quoting *Lennon v. Miller*, 66 F.3d 416, 420-21 (2d Cir. 1995)); *see also Groh v. Ramirez*, 540 U.S. 551, 564-65 (2004) (denying qualified immunity because "no reasonable officer" could have believed the actions at issue were lawful). It cannot be said in this case that the Wardens made unreasonable decisions – that no competent official in their position would have made – to follow these orders in light of the apparently sound bases for BOP's decisions. The Wardens are therefore entitled to qualified immunity as to these claims.

III. Plaintiffs Have Failed Adequately To Allege the Wardens' Personal Involvement As To Plaintiffs' Remaining Claims.

In order to state a claim against a government official in his or her individual capacity, a plaintiff must establish that the official was personally involved in the

alleged violation of law – an essential component of the qualified immunity standard. *Poe v. Leonard*, 282 F.3d 123, 140 (2d Cir. 2002). The following claims against the Wardens should be dismissed because neither the Complaint nor the OIG Report provides the necessary factual bases required at this pleading stage to demonstrate the Wardens' personal involvement in the conduct alleged: (1) discrimination in violation of the Equal Protection clause based on the physical and verbal abuse they experienced (Claim 5); (2) interference with their religious practices in violation of the Free Exercise clause (Claim 7); (3) unreasonable and punitive strip searches in violation of the Fourth and Fifth Amendments (claim 23); and (4) confiscation of their personal property in violation of the Due Process clause (Claim 8).[18]

A. The Personal Involvement Standard.

The "personal involvement" requirement is particularly critical when determining whether supervisory officials – such as wardens of a large detention facility – are entitled to qualified immunity. The doctrine of *respondeat superior* does not apply in a *Bivens* action, and holding a "high position of authority" alone is not enough to trigger liability. *Back v. Hastings on Hudson Union Free Sch.*

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[18] Along with the claims addressed in Section II of this Brief, these claims consist of all those asserted against both Defendants Hasty and Sherman that are at issue in this Appeal. Defendant Sherman is appealing only those claims relating to both him and Defendant Hasty.

Dist., 365 F.3d 107, 127 (2d Cir. 2004). *See also Poe*, 282 F.3d at 140 ("[a] supervisor may not be held liable . . . merely because his subordinate committed a constitutional tort"); *Cuoco v. Moritsugu*, 222 F.3d 99, 109 (2d Cir. 2000) ("[f]or liability to accrue, it is not enough for the defendant simply to be a 'policy maker' at the time unconstitutional events occur").

Instead, this Court has recognized that a government official "may be personally involved in a constitutional deprivation . . . in several ways." *Williams v. Smith*, 781 F.2d 319, 323 (2d Cir. 1986):

1) "[t]he defendant may have directly participated in the infraction." *Id.*
2) "[a] supervisory official, after learning of the violation through a report or appeal, may have failed to remedy the wrong."[19] *Id.*
3) "[a] supervisory official may be liable because he or she created a policy or custom under which unconstitutional practices occurred, or allowed such a policy or custom to continue." *Id.*
4) "a supervisory official may be personally liable if he or she was grossly negligent in managing subordinates who caused the unlawful condition or event." *Id.* at 323-24 (citations omitted).

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[19] However, even the mere allegation that the Wardens knew of a complaint but did not respond does not, by itself, result in liability. *See, e.g.*, *Sealey v. Giltner*, 116 F.3d 47, 51 (2d Cir. 1997).

5) a supervisor who "exhibit[s] deliberate indifference to the rights of inmates by failing to act on information indicating that unconstitutional acts were occurring" may be personally liable. *Colon v. Coughlin*, 58 F.3d 865, 873 (2d Cir. 1995).

B. Allegations of Personal Involvement Must Consist of Specific Facts, Not Conclusory Allegations And Legal Conclusions.

Although Plaintiffs are entitled to the liberal pleading requirements under Federal Rule of Civil Procedure 8(a), they must "put forward *specific, nonconclusory factual allegations*." *Crawford-El v. Britton*, 523 U.S. 574, 598 (1998) (quoting *Siegert v. Gilley*, 500 U.S. 226, 236 (1991) (Kennedy, J., concurring in judgment)) (emphasis added). *See also Leeds v. Meltz*, 85 F.3d 51, 53 (2d Cir. 1996) ("[w]hile the pleading standard is a liberal one, bald assertions and conclusions of law will not suffice"). Indeed, the seminal case of *Harlow v. Fitzgerald* cautioned that "federal courts [must be] alert to the possibilities of artful pleading," and should "firm[ly] appl[y] the Federal Rules of Civil Procedure." 457 U.S. at 808, 820 n.35 (citation omitted). To meet this burden, Plaintiffs are "required to allege personal involvement of defendants in a manner that goes beyond restating the legal standard for liability in conclusory terms." *Patterson v. Travis*, No. 02-CV-6444, 2004 WL 2851803, at *4 (E.D.N.Y. Dec. 9, 2004) (citing *LM Bus. Assocs., Inc. v. Ross*, No. 04-CV-6142, 2004 WL 2609182, *3 (W.D.N.Y.

Nov. 17, 2004)); *see also Nuclear Transp. & Storage, Inc. v. United States*, 890 F.2d 1348, 1355 (6th Cir. 1989) (dismissal where supervisors allegedly "acted to implement, approve, carry out, and otherwise facilitate" the practices at issue); *Patton v. Przybylski*, 822 F.2d 697, 701 (7th Cir. 1987) (dismissal of "boilerplate" allegations of "custom, practice and policy"); *Pollack v. Nash*, 58 F. Supp. 2d 294, 300 (S.D.N.Y. 1999) (dismissal where plaintiff's sole allegation against supervisor was that he "permitted the establishment of certain customs which encourage[d]" alleged constitutional violation).

The *Patterson* court clarified the distinction between pleading "conclusory allegations" and adequately alleging specific facts. It explained that

> [e]xamples of conclusory allegations are statements that defendants knew that harm was occurring or that a plaintiff's rights were being violated but failed to act, without any specific evidence demonstrating the defendants' knowledge, or statements that defendants created a policy that allegedly violates certain rights, without specific evidence of defendants' involvement in the creation of the policy.

Patterson, 2004 WL 2851803, at *4. Applying this standard, the court granted the supervisory officials' motion to dismiss where the plaintiff merely alleged that the defendant "was made aware" of the facts at issue and failed adequately to act on them, finding that these assertions were "unsupported by alleged facts specifically establishing Defendant's knowledge or responsibility." *Id.* at *6. In contrast, the court denied the motion to dismiss for defendants in which the plaintiff alleged

"specific action[s]," such as the allegation that the plaintiff contacted the defendant and requested an investigation into the claims at issue but received no response. *Id.*

Numerous other courts in this Circuit have reached similar results, granting motions to dismiss where there were inadequate allegations of a supervisor's personal involvement. *See Shomo v. City of New York*, No. 03-CV-10213, 2005 WL 756834, at *7 (S.D.N.Y. April 4, 2005) (plaintiff failed to "adequately state that [the supervisory defendants] were aware of the [alleged] violations"); *LM Bus. Assocs. Inc.*, 2004 WL 2609182, at *4 (plaintiffs "have merely restated, in conclusory fashion, the legal standard for finding personal involvement by a supervisory official"); *Ellis v. Guarino*, No. 03-CV-6562, 2004 WL 1879834, at *10 (S.D.N.Y. Aug. 24, 2004) (excessive force claim dismissed where plaintiff failed to allege "specific facts . . . to support the allegation that [the supervisory defendant] knew of the threats to Plaintiff prior to the alleged attacks") (citing *Romer v. Morgenthau*, 119 F. Supp. 2d 346, 355 (S.D.N.Y. 2000)); *Pollack*, 58 F. Supp. 2d at 300.

C. The District Court Erred In Relying On The OIG Report To Establish The Wardens' Personal Involvement.

Although the district court acknowledged that "in order to establish a *Bivens* claim, plaintiffs must allege facts showing that the defendant was personally involved in the alleged constitutional violation," Opinion at *35; SPA at 40, it

failed to apply its own standard as to *the Wardens*. The district court erred by repeatedly relying on the OIG Report in deciding that Plaintiffs adequately alleged the Defendants' personal involvement. In discussing personal involvement relating to Plaintiffs' conditions of confinement claims, the court held:

> I conclude that the MDC plaintiffs have alleged, principally through incorporation of the OIG Report, "sufficient facts to warrant discovery as to the defendants' involvement, if any, in [the] polic[ies] that subjected plaintiffs to lengthy detention in highly restrictive conditions while being deprived of any process for challenging that detention."

Id. (quoting *Elmaghraby*, 2005 WL 2375202, at *20 & n.20). Indeed, the only basis cited by the Court for a finding of personal involvement by the Wardens is the OIG Report. Opinion at *35-36; SPA at 41 (regarding Claim 20, citing *Elmaghraby* Opinion at *20 & n.20 in stating that personal involvement was sufficiently alleged); *Id.* at *46-47; SPA at 53-54 (discussing personal involvement for Claims 21 and 22, "in light of the OIG Report, it is too early to tell whether the plaintiffs will be able to prove the personal involvement of the moving defendants"). The district court's reliance on the OIG Report was wholly misplaced.

The OIG Report does not provide a basis to impute liability against *the Wardens*. The Wardens are hardly referenced in the OIG Report, and the few references that do exist attribute *no* responsibility to them for *any* misconduct alleged in the Complaint. In fact, the only relevant references indicate that the

Wardens acted pursuant to the directives of BOP, which, as discussed *supra*, demonstrates that the Wardens are entitled to qualified immunity as to those claims. In contrast, the OIG Report is *silent* as to *any* involvement by the Wardens in Plaintiffs' claims relating to harsh treatment by correctional officers (which Plaintiffs allege, *inter alia*, violated their Equal Protection rights), interference with their religious practices, unreasonable and punitive strip searches and confiscation of their property.

Thus, the district court improperly relied on the OIG Report to infer the personal involvement of all moving Defendants when the OIG Report does not apply equally to all Defendants. A prime illustration of this point is the portion of the OIG Report excerpted in note 20 of the *Elmaghraby* opinion, which the district court cites repeatedly. In discussing who bore the responsibility for deciding to confine the September 11th detainees in restrictive conditions until cleared by the FBI, the OIG Report discusses the role of the Attorney General, Deputy Attorney General, FBI Director, FBI Defendants, and high-level BOP Defendants, but it *does not* mention the Wardens. Despite the OIG Reports' clear conclusion that the Wardens were *not* personally involved in those decisions, the district court did not dismiss that claim as to the Wardens.

Therefore, the district court's reliance on the OIG Report for demonstrating the Wardens' personal involvement was erroneous. Given the absence of anything

in the OIG Report indicating the Wardens' personal involvement, Plaintiffs must rely on the allegations in their Complaint. As demonstrated below, however, Plaintiffs insufficiently pled the personal involvement of the Wardens as to their claims of (1) harsh treatment based on physical and verbal abuse by correctional officers; (2) interference with their religious practices; (3) unreasonable and punitive strip searches; and (4) confiscation of their personal property.

D. Plaintiffs' Vague and Conclusory Allegations of the Wardens' Personal Involvement in the Alleged Interference with Religious Practices are Insufficient as a Matter of Law.

Plaintiffs allege certain, specific conduct, which they claim interfered with their ability to practice their religion, including, *inter alia*, denying requests for copies of the Koran; refusing to provide Plaintiffs with Halal food; refusing to inform Plaintiffs of the time of day, the day itself or deliberately informing Plaintiffs of the incorrect time of day; and, constantly interrupting Plaintiffs' prayers. Compl. ¶¶ 128 (a)-(d); JA at 133-34. Assuming *arguendo* that these allegations amount to constitutional violations,[20] Plaintiffs have failed to adequately allege the Wardens' personal involvement in this conduct. Instead, Plaintiffs attempt to hold the Wardens *personally* liable for this alleged misconduct

[20] Nothing in the record reflects that the Wardens violated clearly established statutory or constitutional rights of which a reasonable person would have known. *See Lennon*, 66 F.3d at 423 (in the qualified immunity context, the court is "not concerned with the correctness of the defendants' conduct, but rather the 'objective reasonableness' of their chosen course of action given the circumstances").

by: (1) lumping them in with 28 other defendants; or (2) alleging some form of policy or practice theory. Both theories fail as a matter of law.

None of Plaintiffs' allegations regarding interference with religious practices specifically references the Wardens. Instead, Plaintiffs have lumped the Wardens in with "MDC Defendants" – a category that includes 28 of the 32 named defendants, including 12 named MDC correctional officer defendants, 3 named MDC counselor defendants, 10 named MDC supervisor defendants and 6 named MDC policy and implementation defendants[21] – and claimed without any factual allegations as to each individual that this *entire* group of defendants violated their rights. It seems implausible, however, (for example) that the Wardens *themselves* were banging on cell doors, screaming derogatory anti-Muslim comments and shouting expletives while Plaintiffs were trying to pray. Compl. ¶ 128(d); JA at 134. And, the OIG Report – incorporated into the Complaint – confirms they did not. Although the Wardens are included in the group of "MDC Defendants" who allegedly perpetrated these abuses, in light of Plaintiffs' complete failure to specify the Wardens' alleged involvement and the OIG Report's lack of any such findings, the only reasonable inference to be drawn from the Complaint is that the Wardens were *not* part of the "MDC Defendants" committing these acts.

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[21] Defendants Lopresti, Barrere and Cuciti are labeled as MDC Policy and Implementation Defendants and as MDC Supervisor Defendants.

Even if Plaintiffs' allegations did not require such leaps of logic, their approach of lumping all Defendants together has been routinely rejected, including by this Court. In *Atuahene v. City of Hartford*, this Court held that when a complaint "fail[s] to differentiate among the defendants, alleging instead violations by '*the defendants*,' and fail[s] to identify any factual basis for the legal claims made," the complaint must be dismissed. No. 00-7711, 2001 WL 604902, at *1 (2d Cir. May 31, 2001) (emphasis added). Indeed, where the complaint "accuses all of the defendants of having violated all of the listed constitutional and statutory provisions" defendants are entitled to dismissal. *Wynder v. McMahon*, 360 F.3d 73, 80 (2d Cir. 2004). Simply put, Plaintiffs have not buttressed their claims with *any* factual support regarding the Wardens' personal involvement in the alleged conduct. Instead, as in *Atuahene* and *Wynder*, Plaintiffs repeatedly allege in the most conclusory fashion that *all 28* "MDC defendants" violated their rights and interfered with their ability to practice their religion. *See* Compl. ¶¶ 128, 155, 157-59, 173, 193, 207, 229, 319; JA at 133, 143-44, 147-48, 153, 158, 165, 185.

Moreover, to the extent Plaintiffs intend to retreat to a "policy and practice theory" to hold the Wardens personally liable, the Complaint falls short. Rather than provide specific, non-conclusory allegations of the Wardens' personal involvement in creating or implementing any policies related to Plaintiffs' inability to practice their religion, Plaintiffs instead have alleged that *all 28* "MDC

Defendants adopted, promulgated and implemented policies and customs that substantially burdened and interfered with the MDC Plaintiffs' and class members' ability to practice and observe their Muslim faith." Compl. ¶ 128; JA at 133. Although the Complaint does list specific alleged conduct that took place, s*ee id.* at 133-34, it is vague as to what policies were created, who created them, or more generally, how *the Wardens* were involved, if at all. The courts in this Circuit are clear – mere conclusory allegations that a defendant supervisor (or as is the case here, 28 defendants) may have created a policy under which unconstitutional conduct occurred is insufficient to hold the supervisor personally liable. *See Ying Jing Gan v. City of New York*, 996 F.2d 522, 536 (2d Cir. 1993) (affirming the defendant district attorney's motion to dismiss because the Complaint failed to allege he was personally involved in the alleged conduct). In *Ying Jing Gan,* the Court noted that the complaint "contained only conclusory and speculative assertions" regarding the defendant such as "'it is believed' that 'personnel in the District Attorney's Office' engaged in the alleged conduct 'pursuant to the practice, custom, policy, and particular direction of [the defendant]'" and found that "[t]his does not allege either explicitly or by assertion of facts from which such an inference could be drawn that [the defendant] personally participated in the actions that plaintiffs challenge." *Id.* at 536.

Similarly, in *Tricoles v. Bumpus*, the court noted that dismissals were appropriate "where a complaint merely asserts bare conclusory statements that a defendant supervisor failed to supervise or train, or that the alleged constitutional violation occurred as result of a custom or policy that was issued by the defendant supervisor." No. 05-CV-3728, 2006 WL 767897 (E.D.N.Y. March 23, 2006) (granting motion to dismiss). The court stated it succinctly:

> [A] rule that would allow plaintiffs to sufficiently state a claim against a department head merely by making a conclusory statement that the allegedly unconstitutional action perpetrated by subordinates was the result of a policy instituted by the department head would allow plaintiffs to engage in fishing expeditions into the affairs of high-level government officials every time a member of their department is accused of committing a violation under § 1983.

Id. at *4. Simply put, even if Plaintiffs have alleged violations of their constitutional rights as to their religious practices, they have not adequately alleged the personal involvement of the Wardens with the specificity required in this Circuit.

E. Plaintiffs Have Failed to Identify How the Wardens Violated Their Equal Protection Rights.

As noted in Section II.B., *supra*, the "restrictive conditions" portion of Plaintiffs' Equal Protection claim resulted from BOP-directed policies regarding the establishment of the ADMAX SHU and should be dismissed because the Wardens were following facially valid orders. The remainder of Plaintiffs' "harsh treatment" Equal Protection claim centers on the allegations that they were

subjected to "inhumane conditions, and penalize[ed] [] for the practice of their faith" and subjected to physical and verbal abuse at the MDC because of their race, religion and/or national origin. Compl. ¶ 3; JA at 93-94. This claim, however, does not allege the Wardens' personal involvement in the alleged Equal Protection-based discrimination, nor the underlying unconstitutional abuses.

In its simplest form, Plaintiffs' claim here consists of allegations that all of the conditions of their confinement, which form the bases for separate claims, were imposed specifically and intentionally because of their race or religion. These "inhumane conditions of confinement" included "sleep deprivation, constructive denial of recreational activities and hygienic items, and deprivation of adequate food and medical attention." Compl. ¶¶ 155, 173, 193, 207, 229; JA at 143, 147-48, 153, 158, 165. Plaintiffs also allege verbal and physical abuse committed by certain MDC lieutenants, correctional officers, and counselors. *Id.* at ¶¶ 102-109, 153-154, 176, 186, 194-95, 197, 214-18, 227-28, 232-35, 241; JA at 124-26, 141-42, 148, 151, 153-55, 160-61, 164-68.

But in order to plead a valid Equal Protection claim against the Wardens, Plaintiffs must allege that the Wardens committed the alleged abuses against them – or directed that those abuses be committed – *because of* Plaintiffs' race or religion. Although the more egregious conduct alleged by Plaintiffs may rise to the level of constitutional violations, there is no allegation in the Complaint, nor

anything in the OIG Reports, to support the allegation that that the Wardens themselves created or implemented a policy to impose these unconstitutional abuses on Plaintiffs because of their race or religion.

Indeed, noticeably absent from the Complaint are specific allegations that the Wardens personally participated *in any way* in these alleged acts. Instead, Plaintiffs have lumped the Wardens in with the 28 other named "MDC Defendants," a group that is frequently cited as participating in this misconduct. However, with these allegations in particular, Plaintiffs did not hesitate to name numerous individual Defendants with specificity regarding their personal involvement in this extreme misconduct. Indeed, the Complaint is strewn with references to specific Defendants committing specific acts of abuse: Lt. Beck, ¶¶ 154, 216, 232, 239; Lt. Barerre, ¶¶ 195, 205; Lt. Pray, ¶¶ 153, 194; Lt. Torres, ¶ 158; CO Barnes, ¶ 241; CO Chase, ¶¶ 154, 195, 197, 232; CO DeFrancisco, ¶¶ 154, 214; CO Diaz, ¶¶ 154, 195, 197, 214, 216; CO Gussak, ¶ 215; CO Lopez, ¶¶ 205, 214; CO Machado, ¶¶ 154, 214, 216; CO McCabe, ¶¶ 205, 214; CO Mundo, ¶ 215; CO Osteen, ¶¶ 205, 214; CO Rodriguez, ¶ 214; CO Rosebery, ¶ 186; and Defendant Shacks, ¶ 198; JA at 141-44, 151, 153-55, 157-58, 160-61, 166, 168. Similarly, the Supplemental OIG Report concluded, after an extensive investigation, that "approximately 16 to 20 MDC staff members" engaged in

physical and verbal abuse, yet it made *no* findings that could even remotely connect the Wardens to these acts. *See* Supplemental OIG Report at 8; JA at 274.

Thus, although the Wardens are included in the Complaint's group of "MDC Defendants" who allegedly committed these abuses, in light of these more detailed allegations about specific defendants, the only reasonable inference to be drawn from the Complaint is that the Wardens were not part of the MDC Defendants committing the unconstitutional acts.

To the extent Plaintiffs intend to fall back on a "policy and practice implementation" theory, the Complaint again falls short. Although the Complaint alleges that the Wardens implemented policies and customs relating to the treatment of September 11th detainees, Compl. ¶¶ 135-36; JA at 136-37, there is no allegation that the *Wardens* implemented unconstitutional policies that discriminate based on race or religion.[22]

In short, the Plaintiffs have failed to allege facts sufficient to impose personal liability upon the Wardens for the conduct at the MDC that arguably rises

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[22] There is a wide-sweeping allegation that "Defendants" implemented policies based on "invidious animus against Arabs and Muslims." Compl. ¶ 76; JA at 113; *see also* Compl. ¶¶ 8, 57; JA at 96, 107. As discussed above, however, this type of boilerplate allegation that lumps dozens of defendants together does not adequately allege personal involvement. *See Atuahene* and *Wynder*, *supra* section III.D.

to an unconstitutional level. The Wardens are therefore entitled to qualified immunity.

F. Plaintiffs' Vague and Conclusory Allegations of the Wardens' Personal Involvement in the Alleged Unconstitutional Strip Searches are Insufficient as a Matter of Law.

In Claim 23, Plaintiffs allege that they were subjected to "excessive and unreasonable strip searches" in violation of their Fourth Amendment rights and "punitive strip searches" in violation of their Fifth Amendment rights. Compl. ¶¶ 406-411; JA 197-99. Plaintiffs assert this claim against the MDC Policy and Implementation Defendants (which includes the Wardens), the MDC Correctional Officer Defendants and the MDC Supervisor Defendants. Their allegations make clear, however, that the crux of their claim goes to MDC personnel below the level of the Wardens, and that they therefore are relying on a policy and practice theory to impute liability to the Wardens. *Id.* ¶¶ 408, 411; JA at 198-99. Similar to many of their other claims, however, Plaintiffs have failed to allege specific facts regarding the Wardens' personal involvement sufficient to state a claim against them. The Wardens, therefore, are entitled to qualified immunity.

Plaintiffs have specifically alleged facts regarding defendants *other* than the Wardens related to this cause of action. They allege that:

- The strip searches "were employed by *MDC staff* as a way to punish and humiliate the MDC Plaintiffs and class members," Compl. ¶ 112; JA at 127-28 (emphasis added);

- "[T]hese searches were carried out by *MDC Correctional Officer Defendants* under the direction of *MDC Supervisor Defendants,*" *Id.* ¶ 115; JA at 128-29 (emphasis added);

- "[T]he *MDC Correctional Officer Defendants* carried out these deliberately humiliating practices under the supervision and often under the direct observation of MDC Supervisor Defendants, yet the *MDC Supervisor Defendants* did not prevent or correct the practices," *Id.* ¶ 116; JA at 129 (emphasis added); and

- Correctional officer DeFrancisco and Lieutenant Torres committed certain, specific misconduct related to strip searches. *Id*. ¶ 116; JA at 129.

Despite these specific factual allegations about *other* Defendants, Plaintiffs attempt to sue the Wardens for "adopting, promulgating, and implementing the policy and practice" whereby MDC Plaintiffs were subjected to these alleged "excessive and unreasonable strip searches" and "punitive strip searches." *Id.* ¶¶ 408, 411; JA at 198-99. Yet, as Plaintiffs' Complaint makes clear – in reliance on specific findings in the OIG Report – the MDC did not issue any written policies "regarding when detainees were to be strip searched," and "even if such searches were consistent with policy, they were applied inconsistently to the detainees and appeared to be unnecessary." *Id.* ¶ 111; JA at 127. The OIG Report – as alleged in Plaintiffs' Complaint – further concluded that "*staff members* inappropriately used strip searches to intimidate and punish detainees." *Id.* ¶ 114; JA at 128 (emphasis added). These specific allegations make the notion of the Wardens "adopting, promulgating, and implementing" a policy of unconstitutional

strip searches implausible. Plaintiffs' allegations, therefore, are nothing more than a disguised *respondeat superior* claim. Thus, Plaintiffs' attempt to assert a policy and practice claim against the Wardens should be rejected.

Moreover, the mere creation of a policy under which strip searches occurred would not subject the Wardens to liability. To prevail on a *Bivens* claim, the practice or policy alleged must be an unconstitutional one. Plaintiffs' allegations – that the Wardens adopted a policy related to strip searches – is not enough. Here, Plaintiffs allege the strip searches were *carried out* in an abusive fashion, but do not allege that the Wardens ordered such abusive strip searches or that they created an unconstitutional strip search policy. Simply put, the Wardens cannot be held vicariously liable for alleged unconstitutional strip searches under these circumstances, and are therefore entitled to qualified immunity on this claim.

G. Plaintiffs Have Failed to Identify How the Wardens Confiscated Their Property.

Plaintiffs' Fifth Amendment claim for deprivation and confiscation of property must also fail as to the Wardens. Here, Plaintiffs have specifically alleged facts related to this cause of action. They note the specific items that were seized, such as personal identification, money and other personal items, and that these items were confiscated by the FBI, INS or "defendants" *at the time of their arrest*. Compl. ¶¶ 6, 131, 132, 203, 224, 324; JA at 95, 135, 157, 163, 185-86 (emphasis

added).[23] Even the most liberal reading of Plaintiffs' allegations cannot support the proposition that the Wardens were present at the time of Plaintiffs' arrests in their homes, that the Wardens ordered the FBI or INS agents to seize Plaintiffs' property or that the Wardens personally took part in the property seizures.[24]

Plaintiffs also allege that by "adopting, promulgating and implementing" the policy and practice of confiscating personal property at the time of Plaintiffs' arrests, "Defendants Ashcroft, Mueller and Ziglar, and others have intentionally violated [Plaintiffs'] rights." Compl. ¶ 6; JA at 95. Simply put, none of these allegations specifically reference the Wardens themselves, much less their position within the MDC. In light of the specific allegations in the Complaint identifying other persons or agencies responsible for the alleged seizures or confiscations, any reading of the Complaint – even giving Plaintiffs all reasonable inferences – leads to the conclusion that Plaintiffs are not alleging the Wardens participated in this

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[23] Plaintiffs also allege that their personal property was confiscated at the Varick Street Facility before they arrived at MDC. Compl. ¶ 184; JA at 150.

[24] Plaintiff Saffi alleges that Lieutenant Pray and his team confiscated Saffi's personal property when he first arrived in the sally port area to the R&D area of MDC. Compl. ¶ 153; JA at 142. Even if this paragraph alleged the personal involvement of the Wardens – and it does not – it seems to implicate a routine practice at prisons of removing all personal belongings when the detainee is brought to the facility. Certainly, however, those policies would also provide for the return of that property when the detainee was released. There is nothing in the Complaint to suggest that the Wardens implemented a policy or practice to permanently confiscate Plaintiffs' property.

conduct or directed it to occur. Moreover, as discussed in Section III.D., *supra*, Plaintiffs' attempt to broadly assign labels such as "defendants" and "others" should be rejected by this Court in accordance with the law in this Circuit.

In short, a reading of the Complaint that the Wardens had any involvement in this conduct would be unreasonable. Without any allegations of the Wardens' personal involvement in the alleged conduct, and in the face of more specific allegations directed at other Defendants, Plaintiffs' claims against the Wardens should be dismissed.

IV. Plaintiffs' Claims Should Further Be Dismissed For The Reasons Set Forth In Other Appellants' Briefs.

In addition to the arguments made herein, this Court should dismiss Plaintiffs' claims for the reasons set forth in the Brief of Appellants Ashcroft and Mueller.

CONCLUSION

For each of the foregoing reasons, the district court should be reversed, qualified immunity should be accorded to Hasty and Sherman, and all claims against them dismissed.

Dated: January 24, 2007

Respectfully submitted,

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In addition, I certify that that on January 24, 2007, I caused ten copies of the Brief of Appellants Hasty and Sherman to be served via first-class and electronic mail upon the Clerk of the United States Court of Appeals for the Second Circuit.

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